THE HONORABLE RICHARD A. JONES

UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF WASHINGTON

AT SEATTLE

COSTCO WHOLESALE CORPORATION, Plaintiff, AU OPTRONICS CORPORATION, et al., Defendants.	Case No. 2:13-cv-01207-RAJ **DEFENDANTS' COMBINED MOTIONS FOR [1] JUDGMENT AS A MATTER OF LAW (FRCP 50); [2] IN THE ALTERNATIVE, FOR A NEW TRIAL (FRCP 59); AND [3] AMENDMENT OF FINDINGS IN BENCH TRIAL (FRCP 52(b))** **[CITED TRIAL EXHIBITS AND MDL ORDERS FILED CONCURRENTLY]** **[ORAL ARGUMENT REQUESTED]** **Noted on Motion Calendar: August 21, 2015**

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Defendants LG Display Co., Inc., and LG Display America, Inc. (collectively, "LG Display") and AU Optronics Corporation and AU Optronics Corporation America (collectively, "AUO") submit this brief in support of their combined motions for judgment as a matter of law or, alternatively, for a new trial with respect to issues tried by the jury, and in support of their motion for amendment of the findings made by the Court in the bench trial (Dkt. 681) (the "Bench Trial Order"). Parts I-VII of this brief address the reasons for directing entry of judgment in Defendants' favor or, alternatively, ordering a new trial. Part VIII argues that the Bench Trial Order should be amended.[1]

I. INTRODUCTION

Costco recovered nearly $62,000,000 in antitrust damages without ever showing that it paid an illegally fixed price. This Court should direct entry of judgment in favor of Defendants because Costco's damages model—the sole basis for its damages calculation—did not determine the amount of overcharges Costco actually paid. Costco's expert in fact conceded that his damages figures would have been the same even if Costco had purchased all of the products at issue for nothing. On this record, no reasonable jury could have found that Costco suffered injury.

The evidence at trial established that Defendants and others fixed the prices of certain LCD panels sold in Asia, on the one hand, and that Costco purchased finished products containing LCD panels in the United States, on the other. Defendants did not dispute at trial that price-fixing occurred. But the law does not allow every purchaser in the supply chain to recover damages for price-fixed products. Costco itself never purchased an LCD panel from Defendants

[1] Defendants recognize that certain of the arguments made herein with respect to the jury's findings overlap, to some degree, with issues addressed by the Court in the Bench Trial Order. Defendants re-argue those issues here to preserve their right to argue on appeal that the evidence submitted to the jury was insufficient to support the verdict. *See* Fed. R. Civ. P. 50(b). Defendants also reserve the right to challenge the Bench Trial Order in its entirety but in this brief have moved to amend only those findings not addressed in the supplemental briefing ordered by this Court prior to the entry of judgment. *See* Dkt. 671; Fed. R. Civ. P. 52(b); *Fed. Ins. Co. v. HPSC, Inc.*, 480 F.3d 26, 32 (1st Cir. 2007).

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or any other conspiring panel manufacturer. To recover damages based on its purchases of finished LCD products, Costco had to prove that Defendants' price-fixing of LCD panels increased the prices of those finished products.

Costco failed entirely to make this showing: its percipient witnesses had no knowledge as to what entity manufactured the LCD panels in the products Costco purchased; it put on no proof as to how or whether the panels moved in commerce from foreign manufacturers to Costco; and its damages expert, Dr. B. Douglas Bernheim, calculated only an industry-wide overcharge rate for the panels, without taking into account the amount Costco actually paid. Dr. Bernheim's model provided no evidence that the conspiracy had any effect on Costco at all; in fact, he conceded that *his tens of millions of dollars in estimated damages would have been exactly the same even if Costco obtained the finished products for free*. This admission—that the damages calculation was entirely divorced from any calculation of overpayments actually made by Costco—made it logically impossible for a reasonable jury to conclude, as this Court instructed it must, that Costco suffered an injury to its business or property.

Costco's failure to prove a nexus between Defendants' price-fixing in the LCD panel market and Costco's purchases in the television, laptop, and other finished product markets also means that Costco did not prove the "antitrust injury" necessary to establish its standing under *Associated General Contractors of California v. California State Council of Carpenters*, 459 U.S. 519 (1983) ("*AGC*"). At a minimum, as interpreted by the MDL court, *AGC* required Costco to prove that Defendants' price-fixing in the LCD panel market had an effect on the prices Costco paid for finished products—an effect that Costco's expert admittedly never calculated. Costco affirmatively argued—and persuaded the Court—to exclude evidence of any such effect from the trial by successfully moving to prohibit any and all evidence concerning pass-on of overcharges on LCD panels to and from Costco's vendors.

The same absence of proof means that Costco's claims are further barred by the Foreign Trade Antitrust Improvements Act ("FTAIA"), which required Costco to prove that the foreign price-fixed sales of LCD panels had a domestic effect on commerce in the United States. In

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denying Defendants' motion for partial summary judgment on the FTAIA prior to trial, this Court relied on an expectation that Costco would "present evidence that the sale of commodity panels to finished product manufacturers *directly* – as an immediate consequence not depending on uncertain developments – increased the cost of finished products." Dkt. 575 at 10. Once it successfully moved to exclude upstream pass-on evidence, however, Costco eliminated its ability to make the expected showing at trial. By refusing to present evidence that LCD panel overcharges were in fact passed on to Costco in the prices it paid for finished products, Costco could not and did not meet its burden under the FTAIA.

It is no answer to these problems to argue that the Ninth Circuit's decision in *Royal Printing Co. v. Kimberly Clark Corp.*, 621 F.2d 323 (9th Cir. 1980), did away with the requirements that a plaintiff show injury and antitrust standing, or that it lifted the limitations imposed by the FTAIA. *Royal Printing* relieves a plaintiff of the obligation to show that an overcharge was passed down the distribution chain only if that plaintiff first proves that it purchased the actual price-fixed products from a middleman owned and controlled by the price-fixer. *Royal Printing* did not address whether that same analysis could properly be applied where, as here, it is undisputed that the plaintiff never purchased any price-fixed products. Nor does the limited ownership/control exception articulated in *Royal Printing* and its elimination of a showing of upstream pass-on in the same product market undercut the requirement that a plaintiff in a different market show an effect on finished product prices in order to establish its antitrust standing. And *Royal Printing*, which was decided prior to the enactment of the FTAIA, could not erase the statute's requirement of proof that a conspiracy involving foreign sales have a domestic effect—proof that, again, required a showing that overcharges on LCD panels were passed on to Costco and that Costco affirmatively declined to present.

Although Costco managed to get through five weeks of trial skirting these issues, it is this Court's job as the final arbiter of the judgment at the trial level to review the result and ensure that it is legally correct. Because Costco did not present the jury with evidence sufficient to establish that Costco was injured, that it had antitrust standing, and/or that Defendants' conduct

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had a direct effect on U.S. commerce, the current judgment should be vacated and judgment entered in Defendants' favor, or the case should be re-tried.

Alternatively, the amount of the judgment should be reduced because Costco's evidence was insufficient to show that either Royal Philips or Panasonic conspired with the Defendants to fix prices on LCD panels. This failure of proof requires that Costco's single damages be reduced by $11,769,230, and the amount of the judgment recalculated accordingly.

II. STANDARDS FOR DIRECTING ENTRY OF JUDGMENT OR ORDERING NEW TRIAL

A. Motion for Judgment As a Matter of Law

The Court must grant judgment as a matter of law "'when the evidence permits only one reasonable conclusion and the conclusion is contrary to that reached by the jury.'" *Lakeside-Scott v. Multnomah Cnty.*, 556 F.3d 797, 802 (9th Cir. 2009) (quoting *Ostad v. Or. Health Scis. Univ.*, 327 F.3d 876, 881 (9th Cir. 2003)). Although the court must draw all reasonable inferences in favor of the prevailing party, "a reasonable inference 'cannot be supported by only threadbare conclusory statements instead of significant probative evidence.'" *Id.* (quoting *Barnes v. Arden Mayfair, Inc.*, 759 F.2d 676, 680-81 (9th Cir. 1985)). "[W]hen the jury could only have relied on speculation to reach its verdict," judgment as a matter of law ("JMOL") is appropriate. *Id.* at 803.

Defendants moved for JMOL under Rule 50(a) on several grounds prior to the submission of the case to the jury.[2] *See* Dkt. 621; Trial Tr. 3165:10-3170:9, 3174:2-11 (Oct. 21). Defendants hereby renew that motion pursuant to Rule 50(b).[3]

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[2] Unless otherwise noted, the rules referenced herein are the Federal Rules of Civil Procedure.

[3] The arguments herein correspond to the initial JMOL motion as follows: (1) the insufficiency of evidence to show that sales of LCD panels took place in same market as sales of finished products, made in Dkt. 621 at 1-3, is addressed in part IV, *infra*; (2) the insufficiency of the evidence to satisfy the requirements of the FTAIA, Dkt. 621 at 5-7, is addressed in part V; (3) the insufficiency of the evidence to prove that Costco paid overcharges or was otherwise injured, Dkt. 621 at 7-8, is addressed in part III; (4) the effect of the exclusion of evidence of pass-on under *Royal Printing*, Dkt. 621 at 12-13, is addressed in part VI; and (5) the insufficiency of the (footnote continued)

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B. Motion for New Trial

A motion for new trial is appropriate to address claims "'that the verdict is against the weight of the evidence, that the damages are excessive, or that, for other reasons, the trial was not fair to the party moving.'" *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). In deciding a Rule 59 motion, the Court must "'weigh the evidence as [the court] saw it, and [] set aside the verdict of the jury, even though supported by substantial evidence, where, in [the court's] conscientious opinion, the verdict is contrary to the clear weight of the evidence.'" *Id.* (quoting *Murphy v. City of Long Beach*, 914 F.2d 183, 187 (9th Cir. 1990)). "[T]he absolute absence of evidence to support the jury's verdict makes refusal to grant a new trial an error in law." *Id.* (alteration incorporated; internal quotation omitted).

A motion for a new trial under Rule 59 is properly included as an alternative to a motion for judgment as a matter of law. Fed. R. Civ. P. 50(b).

III. THE JURY COULD NOT REASONABLY HAVE FOUND THAT COSTCO PAID OVERCHARGES OR WAS OTHERWISE INJURED

A. Costco Had to Prove That It Suffered an Injury to Its Business or Property As a Result of Defendants' Conduct

This Court instructed the jury that, to prevail on its price-fixing claim, Costco had to prove "that the conspiracy proximately caused Costco to suffer an injury to its business or property." Dkt. 622 at 22 (Inst. No. 20). Explaining this requirement, the Court instructed:

> "An injury to business or property is an economic loss sustained in a commercial interest or venture. An injury to business or property is 'proximately caused' by the conspiracy if an act in furtherance of the conspiracy directly and in a natural and continuous sequence produces, or contributes substantially to producing, the injury. In other words, a defendant is responsible only if it was a member of a conspiracy whose price fixing was a direct, substantial and identifiable cause of the injury that Costco claims to have suffered." *Id.* at 31 (Inst. No. 26).

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evidence to prove the participation of certain conspirators, Dkt. 621 at 8-11, is addressed in part VII. The remaining ground asserted in the JMOL motion, that the evidence was insufficient to show that Costco's vendors were direct purchasers, Dkt. 621 at 3-5, relates to issues addressed by the Court in its Bench Trial Order.

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These instructions were consistent with the fundamental requirement that a plaintiff show causation and injury-in-fact in order to pursue an antitrust claim. "In order to recover treble damages, [the plaintiff] must prove actual causation that it has been harmed by the defendants' infraction of the antitrust laws with 'reasonable certainty.'" *Mid-West Paper Prods. Co. v. Cont'l Grp., Inc.*, 596 F.2d 573, 584 n.43 (3d Cir. 1979). Costco cannot avoid the requirement of proving the fact of injury by conflating it with the relaxed standard of proof allowed with regard to the amount of antitrust damages, or by arguing that the jury could simply infer injury based on Defendants' conduct. *See Flintkote Co. v. Lysfjord*, 246 F.2d 368, 392 (9th Cir. 1957) ("the fact of injury must first be shown before the jury is allowed to estimate the amount of damage); *Amerinet, Inc. v. Xerox Corp.*, 972 F.2d 1483, 1493-94 (8th Cir. 1992) ("The relaxed standard of proof with regard to the amount of antitrust damages does not apply . . . to the plaintiff's burden of proving fact or causation of antitrust injury.").[4]

B. Costco Failed to Show That It Paid Any Overcharges

1. The Evidence Was Insufficient to Show the Source of the LCD Panels in Costco's Purchases

The disconnect at trial between Defendants' conduct and Costco's alleged harm began with Costco's failure to establish with any certainty that LCD panels manufactured by Defendants or co-conspirators were incorporated into the finished products purchased by Costco. Costco buyer Claudine Adamo testified that Costco did not keep track of who made the panels in its electronics and that the maker of the panel was a "non-issue." Trial Tr. 2857:3-2858:8 (Oct. 20). She could not recall ever knowing which entity manufactured the LCD panels in Costco's products. *See id.* Geoff Shavey, Costco's live representative in court, similarly did not always know which company made the panels. He testified that he heard "in meetings" that some of

[4]Defendants reserve the right to argue on appeal that their more expansive instructions regarding the nature of the required injury should also have been given, *see, e.g.*, Dkt. 545 at 194 (Defs.' Proposed Inst. No. 66), and to raise additional instructional issues if appropriate, but for purposes of this motion accept the Court's formulation as correct.

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Costco's vendors were affiliated with panel makers, but he did not and apparently could not testify that those panel makers in fact manufactured the panels sold by their affiliated vendors to Costco. *See* Trial Tr. 1400:12-1401:15 (Oct. 6).

Dr. Bernheim's testimony did not bridge this gap. Although Dr. Bernheim claimed to have identified the source of some of the panels in Costco's products in his work on the case, he did not testify as to the results of that work at trial. Costco introduced none of the documents Dr. Bernheim said he reviewed. *See id.* at 558:13-15 (Sept. 25) ("in some cases, it was possible, through the records of the companies, to actually trace where the panels came from for particular products. And when that was possible, that's what I did."). Rather than identify the sources of any of the panels in Costco's purchases, Dr. Bernheim testified only that the alleged conspirators accounted for "generally at least 85 percent, often higher" of the panel market." *Id.* at 437:9-11 (Sept. 24).[5]

Evidence that the conspiracy had a large market share is insufficient as a matter of law for a jury to conclude that a plaintiff necessarily purchased conspirator products or suffered injury. The MDL court, while recognizing the large market share held by the conspiracy, made it clear that plaintiffs must provide evidence *over and above* market share percentages to show that each plaintiff in fact bought products containing panels manufactured by a conspirator. *See* MDL Dkt. 4683 at 4-5 (Ex. 1)[6] (allowing indirect purchaser class to proceed where plaintiffs "developed a sufficient methodology for identifying potential class members" and "have been able to determine the panel source for numerous products" through methodologies apart from market share). In *In re Static Random Access Memory (SRAM) Antitrust Litigation*, No. 07-md-01819 CW, 2010 WL 5071694 (N.D. Cal. Dec. 7, 2010), the court similarly rejected an argument

[5] The Bench Trial Order accurately summarized the deficiencies of the record with respect to the pathway taken by the LCD panels in the products Costco purchased: "As to the hundreds of millions of dollars of other finished products at issue in this case, there is no direct evidence as to how the panels within them moved from their manufacture, to assembly into finished products, and then to Costco." Dkt. 681 at 7.

[6] All references to "(Ex.)" are exhibits filed concurrently herewith, unless otherwise noted.

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that a purchaser of a SRAM finished product could proceed simply because he had purchased "at a time when Defendants had a significant market share," and refused to allow certain plaintiffs to represent the class where they offered no evidence that Defendants supplied the SRAM in their products. *Id.* at *14.

Just as class certification cases do not allow courts to conclude that a particular plaintiff purchased price-fixed products simply because the conspirators dominated much of the market, the jury here was not entitled to assume that the products that Costco purchased necessarily contained conspirator-made LCD panels. Such an inference would be particularly unreasonable in this case in light of the undisputed evidence that a significant number of LCD panels were made by non-conspirators. *See* Trial Tr. 558:10-559:1, 587:25-588:6 (Sept. 25) (Dr. Bernheim's acknowledgement that some finished LCD products purchased by Costco contained panels not associated with the conspiracy). Although Costco ultimately reduced its damages claim to exclude a percentage for non-conspirator panels, it offered no evidence that its overall line-up of LCD products had ever mirrored the LCD conspirators' market share. To the contrary, the record showed that Costco's sales strategy was to stock only a limited number of items within each product category. This approach, described by Costco buyer Geoff Shavey as a "limited SKU count," meant that Costco would offer 32 to 35 types of televisions, "whereas electronics retailers would have . . . 200." *See* Trial Tr. 1395:5-14 (Oct. 6). During the relevant time frame, Costco offered even fewer than 32 to 35 television models containing LCD panels, as the SKU count included plasma and CRT models. *Id.* at 1395:17-23. For other electronics products, the SKU counts were even more limited (with approximately eight types of laptops, six types of bundled desktop products, and five types of standalone monitors). *Id.* at 1395:24-1396:4. On this record, the jury had no way to determine whether Costco's restricted LCD product offerings contained LCD panels that came primarily from conspirators or non-conspirators.

Costco was not without options in trying to overcome this hurdle. As discussed above, Costco could have elicited testimony from Dr. Bernheim with respect to at least some of the panel sources. Or Costco could have employed and laid out for the jury one or more of the

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methodologies used by plaintiffs to persuade the MDL to allow the indirect purchaser class to proceed. *See* MDL Dkt. 4683 at 4-5 (Ex. 1) (plaintiffs used information obtained in discovery "to determine the panel source for numerous products"; a "brand-model" method "to determine whether a given product used a defendant-made panel"; and supply chain information that "computes the likelihood that a given product contains a defendant-manufactured panel"). Instead, Costco chose to ignore the issue altogether during the evidentiary portion of the trial. In closing argument, Costco's counsel then claimed, with no evidentiary basis, that "90 percent of the panels in the products that Costco bought from those six vendors came from conspirators" and left it at that. Trial Tr. 3428:25-3429:2 (Oct. 22).

2. The Evidence Was Insufficient to Show the Price-Fixing of LCD Panels Inflated the Prices of the Finished Products

Even assuming that Costco either proved, or was not required to prove, that the LCD products it purchased contained conspirator-manufactured panels, the jury could not reasonably have found that Costco was injured based on the evidence presented at trial. Costco's claim that it was damaged relied entirely on the econometric model created by Dr. Bernheim. This model ignored the prices actually paid by Costco and calculated damages based only on the number of units Costco purchased, multiplied by an industry-wide average panel overcharge. In Dr. Bernheim's own words: "when [I] computed this value of LCD panels contained in finished products, [my] damages [model] take[s] the number of units, and [] multipl[ies] it by that global industry-wide price that [I] computed for the panels." Trial Tr. 653:2-8 (Sept. 25). By definition, Dr. Bernheim's model was not designed to, and did not, consider whether Costco in fact paid the panel overcharges he calculated.

Costco tried to distract the jury from this deficiency in the model by repeatedly referencing the dollar value amount of its LCD product purchases from the six vendors at issue, as if that had some relevance to the amount of claimed damages. *See, e.g.*, Trial Ex. 5550 (Ex. 2) (containing slide from Bernheim testimony showing over $1 billion in purchases, divided among the six vendors, and separate slide showing damages, again by vendor); Trial Tr. 344:2-9 (Sept.

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23) (Costco's counsel argued in opening that Costco purchased "$1 billion worth" of products from certain companies and that its damages were "a bit under 5 percent of what Costco paid for those particular products"). Dr. Bernheim, however, had to concede that the total amount Costco spent on finished products played no part in his analysis and did not affect his damages calculation. Trial Tr. 642:4-14 (Sept. 25). As a specific example, Dr. Bernheim testified on cross-examination that the $1,500,000 in damages assigned to the $93,000,000 in purchases Costco made from JVC "would be identical" even if it had bought "exactly the same units for $50,000,000." *Id.* at 644:25-645:11. In fact, Dr. Bernheim conceded that, under his methodology, if Costco "had purchased the same number of units" for "nothing," he would still have calculated exactly the same $1,500,000 in damages. *Id*. at 645:12-13, 18-19.

Numerous examples of Dr. Bernheim's calculations with respect to specific Costco purchases illustrated that Dr. Bernheim mechanically assigned damages based on unit purchases and an industry-wide panel overcharge rate, without regard to the amount Costco actually paid. He stuck to this method *even when the resulting damages amounts were higher than the total price Costco paid for the finished products*. For example, Dr. Bernheim:

- Calculated $1,265.24 in damages for Costco's purchase of 96 Toshiba monitors, when Costco purchased all of them for a total of 96 cents ($0.01 each). Trial Tr. 649:10-650:5 (Sept. 25) & Trial Ex. 5540 (Ex. 3);
- Calculated damages of $495.15 for three Philips monitors that Costco obtained for free. Trial Tr. 646:11-649:9 (Sept. 25) & Trial Ex. 5536 (Ex. 4); Trial Ex. 5539 (Ex. 5); and
- Calculated $106,705.02 in damages for 600 TVs that Costco purchased for a total of $52,650, meaning that the damages were more than twice the total price paid for the products. Trial Tr. 650:6 -651:15, 652:18-653:1 (Sept. 25) & Trial Ex. 5541 (Ex. 6).

The complete disconnect between Costco's damages calculation and the amount Costco actually paid is all the more remarkable because it was by Costco's own doing. Costco

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successfully moved to exclude any evidence as to whether any of the overcharges were passed on from its vendors to Costco in the prices of the finished products it paid—so-called "upstream pass-on" evidence. Dkt. 516 at 4-5; Dkt. 569 at 2-6. Costco made this motion even though the MDL court specifically required plaintiffs to introduce "evidence that defendants illegally raised the prices of their TFT-LCD panels, *and that retail prices increased as a result*" in order to dispense with proof of panel-by-panel impact. MDL Dkt. 4848 at 5-6 (Ex. 7); *see id.* at 2 (indirect plaintiffs will first "prove that the conspiracy resulted in higher prices for defendants' customers"). Dr. Bernheim, perhaps recognizing the hole Costco had dug for itself, tried to explain why his methodology nonetheless allowed a finding that Costco was injured even though his model had nothing to do with, and did not measure, overcharges Costco actually paid. When Dr. Bernheim testified that the next step in his analysis was to multiply damages based on the industry average "by an average pass-through rate to get the best estimate of the overall damages," this Court, in accordance with its ruling on Costco's own upstream pass-on motion, granted Defendants' motion to strike the response. Trial Tr. 653:2-13 (Sept. 25); *see also id.* at 651:19-652:7.

On this record, the jury had no reasonable basis to infer that Costco suffered any injury. Numerous courts have held that a regression model such as that offered by Dr. Bernheim assumes that injury has occurred before calculating damages; the model itself cannot establish the underlying fact of injury in the first instance. *See* MDL Dkt. 4848 at 7 (Ex. 7) (plaintiffs' regression "model cannot be used to prove one of its basic assumptions," i.e., class-wide harm); *In re Plastics Additive Antitrust Litig.*, No. 03-CV-2038, 2010 WL 3431837, at *16 (E.D. Pa. Aug. 31, 2010) (where, "[b]y [the expert's] own admission, his industry-wide regression results . . . do not show . . . that each and every class member . . . paid a higher price than they would have paid absent a conspiracy," the regressions do not constitute proof of classwide impact) (internal citations and quotation marks omitted).

In *In re Optical Disk Drive Antitrust Litigation*, 303 F.R.D. 311 (N.D. Cal. 2014), the court rejected the use of a regression model to establish injury to direct purchaser plaintiffs:

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"Whatever utility such an approach might have in calculating a damages total, it cannot serve to establish that all (or nearly all) members of the class suffered damage as a result of defendants' alleged anti-competitive conduct. The regression analysis offered by [the expert] assumes the very proposition that the DPPs are now offering it, in part, to show." *Id.* at 321. While the model generated an overcharge of "about 11.48 percent in the aggregate . . . nothing in the regression methodology attempts to show that all or nearly all purchasers were overcharged in that amount, or in any amount at all." *Id.*; *see also Mercedes-Benz USA, Inc. v. Coast Auto. Grp., Ltd.*, 362 F. A'ppx 332, 335 (3d Cir. 2010) (affirming summary judgment for defendants where plaintiff failed to establish fact of injury and expert testimony on damages did not consider plaintiff's actual data).

In sum, Costco's only evidence of damages was put on through Dr. Bernheim's testimony, and Dr. Bernheim could not and did not testify that the overcharges on LCD panels were passed on to Costco or that Costco in fact paid the overcharges his model estimated. Costco's decision to avoid showing that it in fact paid inflated panel prices means that it showed no injury at all.[7]

IV. COSTCO DID NOT ESTABLISH THAT ITS INJURY OCCURRED IN THE SAME MARKET IN WHICH COMPETITION WAS BEING RESTRAINED

Even if Costco had shown some type of injury, the evidence was insufficient to establish Costco's standing to recover under the Supreme Court's decision in *AGC*. *AGC* requires the courts to "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." *AGC*, 459 U.S. at 535. A plaintiff must show not only that it was injured but that its injury "is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999); *see* Phillip E. Areeda

[7] The arguments made in this motion apply equally to Costco's claims under Washington's antitrust laws, codified in the Consumer Protection Act ("CPA"), RCW 19.86.030. *See, e.g., Lubic v. Fid. Nat'l Fin., Inc.*, No. C08-0401 MJP, 2009 WL 2160777, at *5 (W.D. Wash. July 20, 2009) ("The state legislature has decreed that courts interpreting the CPA are to 'be guided by final decisions of the federal courts . . . interpreting the various federal statutes dealing with the same or similar matters.'").

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& Herbert Hovenkamp, Antitrust Law ¶ 337(a), at 83 (3d ed. 2007) (in addition to showing injury in fact, private antitrust plaintiff must "connect the alleged injury to the purpose of the antitrust laws").

In the Ninth Circuit, the requirement of antitrust injury means that the plaintiff must prove that it "suffered its injury in the market where competition is being restrained." *Am. Ad Mgmt.*, 190 F.3d at 1055, 1057. "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star–Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987); *see Ass'n of Wash. Pub. Hosp. Dists. v. Philip Morris Inc.*, 241 F.3d 696, 704-05 (9th Cir. 2001) (holding that hospitals harmed by tobacco companies had suffered harm in a different market from the nicotine delivery market and therefore had failed to demonstrate antitrust injury).

It was undisputed that Costco was not a participant in the LCD panel market, as it was neither a "consumer" of LCD panels nor a "competitor" of the LCD panel manufacturers. In analyzing whether two products are in the same market, "the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the [products]." *Bhan v. NME Hosps., Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985). Panels and finished products like TVs or notebooks are not interchangeable products. Costco offered no evidence that the different products are reasonable substitutes for one another. *See, e.g., Apple Inc. v. Psystar Corp.*, 586 F. Supp. 2d 1190, 1196 (N.D. Cal. 2008) (whether products are part of same market depends on whether "consumers view those products as reasonable substitutes for each other").

It is also undisputed that Costco did not allege, and had no proof of, a conspiracy to fix the prices of the finished products Costco actually purchased. Dkt. 556-5 at 4-12, 21 (stating, in response to numerous discovery requests, that "Costco admits that it has no evidence that the conspirators entered into agreements to fix, raise, or maintain the prices for *LCD products themselves*.") (emphasis added). The MDL court allowed Costco and other plaintiffs to survive summary judgment on the question of antitrust injury under *AGC* solely on the understanding that they would prove that the market for LCD panels and the markets for finished products were

"inextricably linked." *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1123 (N.D. Cal. 2008)[8]; MDL Dkt. 4301 (Ex. 8); Dkt. 293; MDL Dkt. 9144 (Ex. 9). In denying those motions, the MDL court specifically relied on allegations that these plaintiffs "purchased TFT-LCD products directly from cartel members at supra-competitive prices as the result of a conspiracy to fix prices," 586 F. Supp. 2d at 1118, and that "changes in the prices paid by direct purchasers of LCD panels *affect prices paid by indirect purchasers of products containing LCD panels*, *id.* at 1123 (emphasis added).

The MDL court rulings denying Defendants summary judgment on the *AGC* issue did not mean that Costco conclusively established that the LCD panel and finished product markets were inextricably intertwined. Costco did not move for, and the MDL court did not grant, summary judgment on this issue. To the contrary, the MDL court specifically noted that "there are factual questions about the relevant market" and that there was a factual dispute about whether a panel overcharge was "traceable" to a finished product. 586 F. Supp. 2d at 1123-24. But, as discussed above, once Costco got to trial, it purposefully ignored the need to prove the critical elements in the MDL court's analysis, i.e., that price-fixing in the panel market affected the prices that Costco's vendors paid or that the overcharges were "traceable" to the finished products Costco purchased. Instead, Dr. Bernheim based his damage calculations on the median panel prices paid in the panel market without regard to what Costco actually paid. Trial Tr. 643:2-644:5 (Sept. 25). And Costco's success in excluding upstream pass-on evidence meant that the record provides no basis for assuming or inferring that pass-on even occurred, let alone for determining the extent to which Costco actually paid overcharges.

[8] The Ninth Circuit has not endorsed this looser "inextricably linked" approach. *See In re Dynamic Random Access Memory (DRAM) Antitrust Litig.*, 536 F. Supp. 2d 1129, 1140-42 (N.D. Cal. 2008) (observing that Ninth Circuit had never endorsed such a broad theory and finding that buyers of computers had not properly alleged standing based on purchases of allegedly price-fixed DRAM).

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Because Costco did not show that it "suffered its injury in the market where competition is being restrained," judgment must be entered in favor of Defendants. *Am. Ad Mgmt.*, 190 F.3d at 1057.[9]

V. THE JURY COULD NOT REASONABLY HAVE FOUND THAT COSTCO'S CLAIMS WERE PERMITTED UNDER THE FTAIA

Costco's failure of proof also requires that the verdict be set aside under the FTAIA. Congress enacted the FTAIA in 1982 to limit the scope of federal antitrust laws. The FTAIA places "*all* (nonimport) activity involving foreign commerce outside the Sherman Act's reach." *F. Hoffmann-LaRoche Ltd. v. Empagran S.A.*, 542 U.S. 155, 162 (2004) (emphasis in original). Unless the conduct involves "import trade or import commerce" with foreign nations, a plaintiff alleging a Sherman Act violation involving foreign conduct must prove that such conduct had "a direct, substantial, and reasonably foreseeable effect" on U.S. commerce that "gives rise" to the plaintiff's claim. *See* 15 U.S.C. § 6a.

This Court interpreted the "import commerce" and "domestic effect" components of the FTAIA and instructed the jury that it could only find an "impact on domestic commerce" if either:

> "1) The panels or products were sold in a transaction between a member of the conspiracy and a customer in the United States. [OR]
>
> 2) The panels or products were sold by a member of the conspiracy outside the United States to a customer outside of the United States, and the sale

[9] Defendants included the question whether Costco established its antitrust standing in the JMOL, *see* Dkt. 621 at 1-3, and submitted a jury instruction on the same market requirement, *see* Dkt. 545 at 174. However, this Court has previously concluded that standing is a question of law for the court to decide. *See, e.g.*, Dkt. 681 at 2; *see also AGC*, 459 U.S. at 535 n.31 ("Harm to the antitrust plaintiff is sufficient to satisfy the constitutional standing requirement of injury in fact, but the court must make a further determination whether the plaintiff is a proper party to bring a private antitrust action."); *Bubar v. Ampco Foods, Inc.*, 752 F.2d 445, 449 (9th Cir. 1985) ("It is apparent that determination of standing is a question of law, defining the limits to which private treble damage actions may be brought for injuries caused in fact by the violation of the antitrust laws."). Defendants therefore believe that the Court may properly determine whether Costco established its standing under *AGC* as a matter of law. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) (explaining plaintiff's trial burden).

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> had a direct, substantial, and reasonably foreseeable effect on later sales to a customer in the United States. An effect is 'direct' if it has an immediate impact on the later sales, which is to say that the impact does not depend on uncertain developments. An effect is 'substantial' if it has a significant impact on the later sales. An effect is 'reasonably foreseeable' if a reasonable person or corporation making the sale would have foreseen its effect on the later sales."

Dkt. 622 at 30 (Inst. No. 25). On this record, no reasonable jury could have found that Costco's claims fell within either of the above provisions.

A. Costco Did Not Prove Any Transactions Between a Member of the Conspiracy and a U.S. Customer

The evidence indisputably failed to show "a transaction between a member of the conspiracy and a customer in the United States." Costco conceded that it did not purchase LCD panels directly from defendants or any other alleged conspirators. Trial Tr. 1400:7-14, 1405:18-22 (Oct. 6). The Verdict Form did not ask the jury to find that Costco's vendors were themselves conspirators, and Costco did not object on this ground or request that those vendors be included. As discussed above, Costco conceded prior to trial that it had no evidence that the finished products were themselves price-fixed, *see* Dkt. 556-5, and it presented no such evidence to the jury.

There being no evidence of any "transaction between a member of the conspiracy and a customer in the United States," the jury could not have found that the "import commerce" exclusion set forth in the first part of the Court's instructions applied here. Dkt. 622 at 30 (Inst. No. 25).

B. The Evidence Was Insufficient to Satisfy the Domestic Effects Exception

Costco also failed to introduce sufficient evidence to satisfy the "domestic effects" exception to the FTAIA. The Ninth Circuit defines the "direct effect" component of this exception to mean that the effect "follows as an immediate consequence of the defendant's activity." *United States v. LSL Biotechnologies*, 379 F.3d 672, 680 (9th Cir. 2004). An effect cannot be "direct" where it depends on "uncertain intervening developments." *Id.* at 681; *see United States v. Hui Hsiung*, 778 F.3d 738, 758-60 (9th Cir. 2015).

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In denying Defendants' motion for summary judgment on certain of Costco's damages under the FTAIA, this Court relied on Costco's assertion that the "'direct, substantial, and reasonably foreseeable effect' of Defendants' foreign conduct is to raise the prices of finished products." Dkt. 575 at 9-10; *see* Dkt. 503 at 14-17. While recognizing the possibility "that any impact on the price of the finished product will be indirect," this Court observed that "Costco intends to present evidence that the sale of commodity panels to finished product manufacturers *directly*—as an immediate consequence not depending on uncertain developments—increased the cost of finished products." Dkt. 575 at 10. The Court expressed "no opinion on whether Costco can succeed in that endeavor" but found "no basis to stop it from attempting to do so at trial." *Id.*

This Court's analysis was directly in line with the MDL court's reasoning in denying summary judgment motions earlier in the LCD panel litigation. In the Indirect Purchaser Plaintiff Class action, the MDL court specifically relied on the plaintiffs' "theory of domestic effect" that "[t]he increased price of the [LCD panel] components caused the prices of the finished products in the United States to increase." MDL Dkt. 3833 at 17 (Ex. 10). The MDL court concluded: "If this effect is not 'direct,' it is difficult to imagine what would be." *Id.*[10]

[10]In *Hui Hsiung*, a criminal case arising out of the LCD price-fixing conspiracy, the Ninth Circuit concluded that the evidence supported application of the FTAIA's import commerce exclusion. *See* 778 F.3d at 754-56, 760. Although not necessary to its decision, the Court then considered whether the government had also established a sufficiently direct effect on commerce to meet the "domestic effects" exception to the FTAIA. Based on witness testimony and other evidence purportedly linking the price-fixing of LCD panels to "increased prices to customers in the United States," the court found that the evidence was sufficient to uphold the conviction under the domestic effects prong. *Id.* at 759-60.

Here, Costco affirmatively moved to exclude any and all evidence that could potentially show that the fixing of the panel prices increased the prices of finished products sold to customers in the United States. Having done so, Costco cannot now argue that there is evidence from which the Court could infer that finished product prices paid by anyone, let alone Costco, were inflated by the LCD panel overcharges. In any event, the *Hui Hsiung* court only evaluated whether there was a direct effect "on the United States market" that would allow a criminal conviction, not whether particular customers or plaintiffs had established the element for purposes of allowing them to recover damages. *See id*. at 759.

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As discussed above, Costco did not live up to its expected showing of a direct effect on finished product prices. Costco affirmatively moved to exclude evidence that the increased price for LCD panels was passed on in the prices of finished products. As such, there was no basis for the jury to find that finished products were sold to Costco at illegally inflated prices. Trial Tr. 651:19-652:7 (Sept. 25). Consequently, the jury could not reasonably have found that the conspiracy had a "direct, substantial, and reasonably foreseeable effect on later sales to a customer in the United States." Dkt. 622 at 30 (Inst. No. 25).[11]

VI. *ROYAL PRINTING* DID NOT RELIEVE COSTCO OF THE OBLIGATION TO PROVE ANTITRUST INJURY AND/OR AN EFFECT ON DOMESTIC COMMERCE

Costco skated through the trial without giving the jury a basis for finding the critical elements of injury-in-fact or antitrust standing and without showing that Defendants' conduct had a domestic effect under the FTAIA. The Ninth Circuit's decision in *Royal Printing* did not and could not excuse Costco from these requirements: (1) *Royal Printing* did not address the situation where the plaintiff never purchased the price-fixed product; (2) *Royal* Printing was decided three years before *AGC* and does not affect the showing required for antitrust standing; and (3) *Royal Printing* was decided two years before the FTAIA was enacted and did not

[11] The recent decision on the claim of another LCD panel plaintiff, Motorola Mobility LLC, similarly illustrates the "remarkable dearth of evidence from which to infer actual harm to" an LCD plaintiff that disavows any showing that the price-fixing of the panels caused injury further down the distribution path. *See Motorola Mobility LLC v. AU Optronics Corp.*, 775 F.3d 816, 821 (7th Cir. 2015). Like Costco, Motorola relied on the expert opinion of Dr. Bernheim to support its damages claim. Judge Posner described Dr. Bernheim's testimony as "discuss[ing] only the damages that Motorola's foreign subsidiaries [i.e., foreign companies] incurred from having to overpay for LCD panels. He made no attempt to estimate the increase in the price paid by [American-based] Motorola for finished cellphones." *Id.* at 824. The court pointed out that Motorola had originally claimed that "it paid more for cellphones" as a result of the conspiracy but that "[h]ow the overcharge may have affected Motorola's cellphone business because of the component price fixing was a path that Motorola stepped off of after the pleadings." *Id.* at 823.

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consider the FTAIA's requirement that, in cases involving foreign commerce, a plaintiff show a "domestic effect" as an element of a Sherman Act claim.[12]

A. *Royal Printing's* Upstream Pass-On Analysis Does Not Apply to a "Component" Case

In *Royal Printing*, the plaintiff sought to recover damages based on its purchases of paper products that were the subject of a price-fixing conspiracy. The Ninth Circuit allowed the printer to proceed as a direct purchaser under the ownership/control exception with respect to its indirect purchases of price-fixed paper products from wholesalers controlled by the price-fixers. *See* 621 F.2d at 327 (allowing plaintiff to proceed on "suit against the manufacturers of the products it purchased" from a specific subsidiary and specific division owned by two of the defendants). The court found that it was "agreed that this paper was manufactured by other appellees," *id.* at 324, and that conspirators could be sued on a theory of joint and several liability, *id.* at 327. In that context, the court allowed the plaintiff to dispense with a showing that the wholly owned subsidiaries or divisions who sold the price-fixed products passed on the full amount of the overcharge. *See id.* at 327-28.

A key distinction between Costco's situation and that of the printer in *Royal Printing* is that Costco purchased finished products allegedly containing price-fixed components, rather than

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[12] Defendants recognize this Court must follow *Royal Printing* if it applies to this case. For appellate purposes, however, Defendants renew their position that in light of *Kansas v. Utilicorp United, Inc.*, 497 U.S. 199 (1990), the Ninth Circuit's decisions in both *In re ATM Fee Antitrust Litigation*, 686 F.3d 741, 757 (9th Cir. 2012), and *Royal Printing* are inconsistent with *Illinois Brick* and should not be followed.

Illinois Brick sets forth the bright line rule that indirect purchasers such as Costco do not have standing to bring Sherman Act claims. *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 730-33 (1977). In *Utilicorp*—decided 13 years after *Illinois Brick*—the Supreme Court explained that its "stated decision not to carve out exceptions" to the bar on indirect purchaser actions meant just what it said: There would be no new exceptions and it would be an "unwarranted and counterproductive exercise to litigate" otherwise. *Utilicorp*, 497 U.S. at 216-17 (internal quotations and citations omitted). Because the control exception articulated in *Royal Printing* is a creation of Circuit law, Defendants believe the Ninth Circuit should revisit the question of its propriety under Supreme Court precedent. *See Royal Printing*, 621 F.2d at 326 & n.4; *id.* at 327 n.8 ("The [*Illinois Brick*] Court was not, however, considering the situation where the direct purchaser is controlled by a co-conspirator.").

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the price-fixed LCD panels themselves. However reasonable it may be to assume that an overcharge on a price-fixed products is passed on by a wholly owned subsidiary when the product is not altered or incorporated into another, once the price-fixed component moves into another market that is not price-fixed, that rationale disappears. *See Illinois Brick*, 431 U.S. at 735-36, 743-44 (refusing to allow suit by indirect purchasers who argued that overcharges on concrete blocks had been passed on by general contractors to purchasers of finished masonry structures, due in part to the complexities of determining how the overcharge affected prices in different markets).

This distinction between the plaintiff's purchase of a price-fixed product and the purchase of a product affected by or containing a price-fixed component is seen throughout the *ATM Fee* decision, which involved a price-fixed "component" in the form of an "interchange" fee charged by the ATM network to its member banks. The plaintiffs alleged that the defendant banks conspired to fix the interchange fee in order to raise foreign ATM fees paid directly by the plaintiffs to the defendants. Before engaging in the ownership/control analysis that ultimately led the court to find that the plaintiffs were indirect purchasers who lacked standing, the court specifically noted that "the Bank Defendants *pass on the cost of the interchange fees* through the foreign ATM fees." 686 F.3d at 750 (emphasis added). The court specifically rejected the argument that "conspiring to set a price for the purpose and effect of raising the price at issue equates to fixing that price and makes the payers of the raised price direct purchasers." *Id.* at 753.

Neither *Royal Printing* nor *ATM Fee* considered what would happen if a plaintiff brought a claim based on its purchase of a non-price-fixed product *without* a concurrent showing of upstream pass-on. Extending the limited exceptions in those cases to cover this situation would allow exactly what has happened here, i.e., a defendant could be forced to pay damages even if the plaintiff never bought the price-fixed product and never showed that it suffered an injury. There is no authority for expanding *Royal Printing's* upstream pass-on analysis in connection with purchases of price-fixed products to cover plaintiffs who made no such purchases. *See*

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Kansas v. Utilicorp United, Inc., 497 U.S. 199, 216 (1990) (courts should not engage "an unwarranted and counterproductive exercise to litigate a series of exceptions" to its rules on antitrust standing).

B. *Royal Printing* Does Not Extend to *AGC's* Standing Requirements

Under the MDL court's rulings, Costco was allowed to pursue its claims as a finished product purchaser outside the LCD panel market only on the *express understanding* that it would prove the overcharges on the price-fixed panels were passed through to the finished products. *See* part IV, *supra.* A showing that the price-fixing of the components had an effect on the finished product prices, i.e., that the overcharges were passed on, is a fundamental requirement for antitrust standing under *AGC* that *Royal Printing* had no occasion to address. [13]

Defendants anticipate that Costco will argue that *Royal Printing* nonetheless excused it from showing pass-on of the overcharges by its vendors because of this Court's conclusion that those vendors were owned or controlled by conspirators. Costco would, in effect, have this Court graft *Royal Printing's* "vertical" exception, that allows a plaintiff purchasing a price-fixed product downstream from a wholly owned subsidiary, onto *AGC's* "horizontal" exception, allowing a plaintiff in a different market to sue if the illegal overcharges affected the prices in that market. But applying *Royal Printing* to allow a plaintiff in the finished LCD product market to recover without showing that overcharges on LCD panels were passed on would undermine the very rationale for allowing the plaintiff in a different market to proceed in the first place, i.e., that it could and would prove an effect on finished product prices. Particularly given that *Royal Printing* was decided three years before *AGC*, such an extension would further violate the

[13] Other courts allowing purchasers of finished products to sue for the price-fixing of components have similarly relied on allegations that the plaintiffs will show an actual effect on finished product prices. *See In re Graphics Processing Units Antitrust Litig.*, 540 F. Supp. 2d 1085, 1098 (N.D. Cal. 2007) (purchasers of computers could sue over restraint in market for graphics processors because processors are "separate components of a computer and . . . any costs attributable to them are traceable through the chain of distribution"); *In re Auto. Parts Antitrust Litig.*, 50 F. Supp. 2d 836, 855 (E.D. Mich. 2014) (purchasers of cars had standing to sue over restraint in market for bearings where plaintiffs contended "they can trace overcharges through the distribution chain").

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Supreme Court's instruction not to expand exceptions to its indirect purchaser rule. *See Utilicorp*, 497 U.S. at 216.

C. *Royal Printing* Does Not Affect the FTAIA's Requirements

Just as *Royal Printing* did not eliminate the requirement that Costco prove injury and antitrust standing under section 15(a) of the Sherman Act for domestic transactions, it did not eliminate the requirement that Costco prove a domestic effect under the FTAIA. In *United States v. LSL Biotechnologies*, 379 F.3d 672 (9th Cir. 2004), the Ninth Circuit rejected the argument that "the FTAIA merely codified the existing common law regarding when the Sherman Act applies to foreign conduct." *Id.* at 679. Rather, the FTAIA created "substantive elements under the Sherman Act in cases involving nonimport trade with foreign nations." *Hui Hsiung*, 778 F.3d at 753; *see id.* at 751.

Royal Printing, which on its facts involved only domestic conduct, did not address foreign transactions. The case also predated Congress' passage of the FTAIA, adding the explicit requirement that the plaintiffs show an "effect" of foreign conduct on domestic commerce that gives rise to their claims. *Royal Printing* allowed certain indirect purchasers to sue for overcharges without determining whether and to what extent the overcharge was in fact passed on to it, because the court found it "intolerable" to "close off every avenue for private enforcement of the antitrust laws in such cases." 621 F.2d at 327. Whatever the merits of this approach, Congress made exactly the opposite decision in the FTAIA by requiring that, as an element of the claim, a plaintiff show that foreign transactions have a direct effect on domestic commerce in order to give rise to any interest in having U.S. antitrust law enforced at all.

Because Costco affirmatively refused to show the "direct effect" of the conspiracy's foreign transactions on "the cost of finished products" that this Court anticipated and the law required, the jury could not reasonably have found that the requirements of the FTAIA were satisfied. *See* Dkt. 575 at 10.

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VII. ALTERNATIVELY, THE JURY COULD NOT REASONABLY HAVE FOUND THAT ROYAL PHILIPS AND PANASONIC WERE CO-CONSPIRATORS

Even assuming Costco had sufficiently shown antitrust injury and could overcome the FTAIA hurdle, the jury could not reasonably have found that Royal Philips or Panasonic participated in the conspiracy. Because the jury's findings as to these entities account for over $11.7 million of the jury's award prior to trebling, this Court should reduce the verdict and recalculate the judgment accordingly.

A. The Evidence Was Insufficient to Show That Royal Philips Participated in the Conspiracy

The jury awarded $7,347,670 in damages based on Costco's purchases from Philips Electronics North America Corp., a wholly owned subsidiary of Koninklijke Philips Electronics N.V. ("Royal Philips"). Dkt. 628 at 3. It was undisputed that no representative of Royal Philips ever attended a Crystal Meeting. Most of Costco's evidence regarding Philips showed only that it was an LCD panel customer, not a panel manufacturer. *See, e.g.*, Trial Tr. 1589:2-3 (Oct. 7) (Philips used panels for its own production). Dr. Bernheim conceded that discussions between manufacturers and customers about pricing are "legitimate" buyer-seller communications. Trial Tr. 441:14-19 (Oct. 8). Such evidence provides no rational basis for a jury to conclude that a participant in such communications was price-fixing. *See In re Citric Acid Litig.*, 996 F. Supp. 951, 959 (N.D. Cal. 1998) (price increase communication was "innocuous" where it related to a sale from one party to the other: "the fact that [an alleged conspirator] discussed prices does not necessarily mean that it agreed to fix prices, or that it improperly exchanged price information").

The few documents Costco offered regarding Philips' status as a panel manufacturer related to discussions with Epson personnel during the late 1990s through 2004. *See* Trial Ex. 22 (Ex. 11); Trial Ex. 114 (Ex. 12); Trial Ex. 389 (Ex. 13); Trial Tr. 1945:12-16 (Oct. 8). But Epson employee Takato Imai testified, without contradiction, that Epson did not manufacture TFT-LCD panels until sometime *after* the fall of 2004. *See* Trial Tr. 1943:1-12 (Oct. 8). Absent evidence that Epson was even making panels before that point, no jury could reasonably find that Philips and Epson personnel were discussing price-fixing of those panels in the earlier years.

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Indeed, one of the Epson documents that reflected communications with Philips in November of 2004 related to an *entirely different product*—STN-LCD panels—which Costco stipulated prior to trial were not part of its damages claim. *See* Trial Ex. 936 (Ex. 14) (discussing "B/W" and "CSTN" panels only); Stipulation Re Evidentiary Issues, Dkt. 510 ¶ 2. These documents provided no basis for the jury to conclude that these companies were reaching price agreements on LCD panels.[14]

Finally, Costco introduced an internal Sharp email that appears to reflect a meeting that was held with Philips' "monitor division" and a discussion about monitor panel shortages. The email also reflects that Sharp asked Philips for its demand forecast. *See* Trial Ex. 788 (Ex. 16). Although the email contains information collected from AUO, CMO, HannStar and TMD, the only specific inference that can be drawn with respect to *Philips* is that the Philips monitor division was a customer of Sharp's. It is not reasonable for a fact finder to conclude that being mentioned in the same internal email as other conspirators is the basis for a finding of price-fixing. *See Willis v. Marion Cnty. Auditor's Office*, 118 F.3d 542, 545 (7th Cir. 1997) ("mere scintilla" of evidence not enough to sustain verdict).

In light of the clear conflict between Costco's claim that Royal Philips participated in the conspiracy and the undisputed evidence that Royal Philips' only communications with conspirators occurred before those companies made panels or after Royal Philips became a panel customer, the jury could not reasonably have concluded that Royal Philips was a participant in the TFT-LCD panel conspiracy.

B. The Evidence Was Insufficient to Show That Panasonic Participated in the Conspiracy

The jury awarded $4,421,560 based on Costco's purchases from Panasonic Corporation of North America (PCNA). This award depended on the finding that PCNA's parent, Panasonic

[14] Another internal Epson document from the same period discussed only a request for an information change and pricing to Amazon, without reference to the specific type of panel technology. *See* Trial Ex. 924 (Ex. 15).

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Corporation, participated in the conspiracy. Dkt. 628 at 3; Dkt. 681 at 10. In closing argument, Costco's counsel cited four documents that allegedly showed this participation: Trial Exhibits 11 (Ex. 17), 99 (Ex. 18), 979 (Ex. 19), and 1024 (Ex. 20); *see* Trial Tr. 3424:12-17 (Oct. 22). None of these documents was generated by Panasonic, and none was sufficient for the jury to conclude that Panasonic participated in the conspiracy.

Two of the cited exhibits are internal scheduling emails circulated among LG Display employees in early 2005 that discuss upcoming meetings with Panasonic and multiple other companies. *See* Trial Ex. 979 (Ex. 19), Trial Ex. 1024 (Ex. 20). Merely scheduling a meeting is not illegal. Nothing in the record provides a basis for inferring that these meetings were intended to involve any discussion of pricing or any illegal behavior. Costco introduced no evidence as to what actually happened at the meetings or whether they even occurred.

With respect to Panasonic, Costco also directed the jury to an *internal AUO email* stating that a "consensus has been made among LG, Samsung, CPT, Mitsubishi, and HannStar" regarding 15" panel prices. *See* Trial Ex. 99 (Ex. 18). As to Panasonic (then called Matsushita), the email simply states, "From a separate source, Simon learned that Matsushita is ready to give up their 15-inch supply to Viewsonic[] when a price lower than $220 was requested." *Id*. In addition to being hearsay, this statement is meaningless. Costco never alleged that Viewsonic was a conspirator, and it is impossible to tell whether this information came from Panasonic, Viewsonic, or someone else.

Costco's remaining piece of Panasonic "evidence" was an internal CPT document prepared by CPT's C.C. Liu after a December 17, 1998 meeting with Panasonic's predecessor, Matsushita. *See* Trial Ex. 11 (Ex. 17). The report stated that Matsushita was "not able to follow the price increases" in the market because of "a gap in quality with the mainstream market brand." *Id.* Although Costco repeatedly pointed to this document as evidence of Matsushita's supposed participation in the conspiracy, the document on its face addressed only past prices and did not reflect any agreement to fix prices in the future. Mr. Liu gave undisputed testimony that CPT did even begin manufacturing LCD panels until sometime in 1999. Trial Tr. 1132:17-22

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(Oct. 1). In 1998, CPT had a licensing and distribution agreement with Matsushita. Trial Tr. 1132:17-1133:3 (Oct. 2).[15] Mr. Liu testified that he attended the December 18, 1998, meeting and that CPT did not in fact fix prices with Panasonic at this meeting. *See* Trial Tr. 1132:2-5, 1133:12-14 (Oct. 1).[16] There is no contrary evidence.

On this record, the jury could not reasonably conclude that Panasonic conspired to fix prices of LCD panels from 1998 to 2006, particularly when other portions of the record refer to Panasonic either as a customer of other TFT-LCD producers or, in at least one document, as a supplier of component parts for TFT-LCD panel makers. *See, e.g.*, Trial Ex. 1094 (Ex. 24) ("the major customers of Sharp . . . include Toshiba, JVC, Philips, *Matsushita*, etc. . . .") (emphasis added); Trial Ex. 266 (Ex. 25); Trial Ex. 662 (Ex. 26); Trial Ex. 80 (Ex. 27); Trial Ex. 118 (Ex. 21); Trial Ex. 281 (Ex. 28) (supplier); Trial Ex. 330 (Ex. 29); Trial Ex. 485 (Ex. 30); Trial Ex. 502A (Ex. 31) ("Sharp . . . is even experiencing difficulties supplying to Matsushita . . . ."). The jury's finding that Panasonic participated in the conspiracy cannot stand.

VIII. THE COURT SHOULD AMEND ITS FINDINGS THAT COSTCO HAD STANDING TO SUE

Separate and apart from the jury verdict, Defendants respectfully submit that the Court's findings with respect to ownership and control are erroneous and request that the Court amend those findings for the reasons set forth herein. Amendment of findings is proper when the Court has made "manifest errors of law or fact" or "to prevent manifest injustice." *See McDowell v. Calderon*, 197 F.3d 1253, 1255 n.1 (9th Cir. 1999); *Houston Gen. Ins. Co. v. St. Paul Fire & Marine Ins. Co.*, No. C11-2093-MJP, 2013 WL 4809274, at *1 (W.D. Wash. Sept. 9, 2013). Amendment on these grounds is proper even if the errors required reversal of the judgment.

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[15] Although the transcript at some points in this discussion says "Mitsubishi," it is clear from the context that the parties were discussing "Matsushita." Costco dropped any claims that Mitsubishi participated in the conspiracy prior to trial. *See* Trial Tr. 3088:4-9 (Oct. 21).

[16] Other exhibits reference Panasonic in its capacity as a panel purchaser negotiating with panel makers on prices which, as discussed above, Dr. Bernheim and the courts agree are legitimate reasons for price communications. *See* Trial Ex. 118 (Ex. 21), Trial Ex. 646 (Ex. 22), Trial Ex. 1408 (Ex. 23).

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Nat'l Metal Finishing Co. v. BarclaysAmerican/Commercial, Inc., 899 F.2d 119, 123 (1st Cir. 1990); *see also* 5A James W. Moore, et al., Moore's Federal Practice ¶ 52.11[2] (2d ed. 1996) ("If the trial court has entered an erroneous judgment, it should correct it.").

A. The Court Should Amend Its Conclusion That Wholly Owned Subsidiaries of Conspirators or Conspirators Subsidiaries Were "Controlled" by Members of the Conspiracy

Defendants request the Court to amend its conclusion in the Bench Trial Order that wholly owned subsidiaries of conspirators or conspirator's subsidiaries were "controlled by members of a subsidiary." Dkt. 681 at 11. In *ATM Fee*, the Court found that an ownership interest of approximately ten percent was "insufficient" to show control for purposes of the exception. 686 F.3d at 757. Although the court suggested, in dicta, that a majority ownership interest might suffice, it did not decide the issue. Given the strict limitation on expanding exceptions to *Illinois Brick*, Defendants submit that the legally correct test for application of the ownership/control exception is whether there has been "such functional economic or other unity [between the defendant and the middleman] that there effectively has been only one sale between the defendant and the indirect purchaser." *In re Vitamin C Antitrust Litig.*, 279 F.R.D. 90, 101 (E.D.N.Y. 2012) ("*Vitamin*") (internal quotations omitted).

The *Vitamin* court held that the existence of a parent-subsidiary relationship alone is insufficient to satisfy *Illinois Brick*'s owned or controlled exception. *Id.* ("A plaintiff seeking to gain the benefit of this exception must therefore present facts demonstrating that such unity exists and may not rely simply on the existence of a parent-subsidiary relationship"); *see also Jewish Hosp. Ass'n v. Steward Mech. Enters., Inc.*, 628 F.2d 971, 975 (6th Cir. 1980) (ownership/control exception "is limited to relationships involving such functional economic or other unity between the direct purchaser and either the defendant or the indirect purchaser that there effectively has been only one sale").

In *Vitamin*, the court found the fact that the alleged conspirator owned 100% of the direct purchaser to be "singularly insufficient" to show that the subsidiary was responsible for the overcharge. 279 F.R.D. at 101-02. Rather, the relevant inquiry was whether the parent had

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"such control over the subsidiary that the defendant can be said to have set prices along the chain of distribution." *Id.* at 101 (internal quotations omitted). Because the subsidiary's "pricing determinations were influenced by market factors such as competition" with other distributors, the court found that the "evidentiary complexities and uncertainties" that led to *Illinois Brick* and *Hanover Shoe* were "present with full force" in the case before it, making "an exception to the direct purchaser rule . . . unwarranted." *Id.* at 101-02.

The same problems with the jury's determination that Costco suffered injury arise with the Court's use here of a simple majority ownership rule with respect to Costco's vendors: there is no basis for knowing or assuming how prices were set further down the distribution chain or whether Costco in fact suffered any overcharge. The functional economic unity test addresses this problem by requiring a showing that the conspirator was effectively able to set prices farther down the chain, a showing that Costco conceded at the outset it would be unable to make and that it did not even attempt at trial. The Court should therefore amend its findings and hold that under the economic unity test, Costco failed to establish that any of its vendors were controlled by any of the conspirators.

B. The Court Should Amend Its Conclusion That the Control Exception Applied to JVC Even After Panasonic's Equity Interest Declined to Less Than a Majority

At a minimum, Defendants request the Court to amend the finding that the Panasonic-JVC relationship was sufficient to permit Costco to recover damages based on its purchases from JVC. The jury award of $662,860 in JVC-related damages depended entirely on whether JVC's relationship with Panasonic, once Panasonic was found to be a conspirator, met the ownership/control test. The parties stipulated, and this Court found, that until July 2007, Panasonic owned between 52% and 53% of JVC. Beginning in July 2007, Panasonic's equity interest in JVC declined to 36.8 percent. Dkt. 681 at 10. By October 1, 2008, Panasonic's share in JVC decreased to 24.4 percent. Dkt. 599 at 6. This Court concluded that "even though a conspirator no longer controlled JVC after July 2007," there was "no realistic possibility that a former subsidiary of a conspirator would sue over wrongs that took place when the subsidiary

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was under the control, . . . particularly . . . where a conspirator retained substantial influence over JVC until well after the conclusion of the conspiracy." *Id.* at 12.

Defendants respectfully submit that the Court's extension of the ownership/control exception to allow standing even when a conspirator has less than a majority interest in the direct purchaser is directly contrary to the holding in *ATM Fee*. There, the Bank Defendants had at one time controlled the ATM network that set the improper fees but by the time of the lawsuit their interest had declined to approximately ten percent. The plaintiffs, relying on *Freeman v. San Diego Association of Realtors*, 322 F.3d 1133, 1145-46 (9th Cir. 2003), argued that there was still no realistic possibility of suit because of, among other things, the banks' participation as direct purchasers in a conspiracy with the seller to set a cost passed on to the Plaintiffs. The Court made clear that there is no separate exception based simply on the "no realistic possibility" of suit theory: rather, that lack of possibility must arise *because of an ongoing and sufficient control* relationship. *See* 686 F.3d at 757 (in *Freeman*, "the ownership or control of the direct purchasers by the conspiring seller created no realistic possibility of suit"). The court made it equally clear that, although *Freeman* recited the "no realistic possibility" language, "*Freeman* did not create a new variation of the *Royal Printing* exception, because *Freeman* relied on ownership and control to find standing." *Id.* at 756; *see* Dkt. 558 at 9-10.

Here, the sum total of the evidence in both the bench and jury trial records consisted of the facts in the stipulation showing Panasonic's declining ownership percentages in JVC and the statement that, by the second quarter of 2008, JVC was "no longer a consolidated subsidiary of Panasonic Corp." Dkt. 599 at 6. There was no evidence of any ongoing control by Panasonic apart from its minority interest, *e.g.*, no evidence that Panasonic controlled or dominated the board of JVC, no evidence that it could set prices, and no evidence that any advice it gave would be followed. *See ATM Fee*, 686 F.3d at 757-58. By finding that the Panasonic-JVC relationship nonetheless met the ownership/control test, this Court has done exactly what the Ninth Circuit declined to do in *ATM Fee*, that is, "extend the exception . . . to situations where the seller does not own or control the direct purchasers," based on the Supreme Court's admonition not to extent

the exception "even in rather meritorious circumstances" in order to avoid "undermin[ing] the rule." *Id.* at 757 (quoting *UtiliCorp.*, 497 U.S. at 216).

The Court should amend its findings, rule that Costco failed to demonstrate the applicability of the exception with respect to the Panasonic-JVC relationship, and reduce the amount of the judgment accordingly.

IX. CONCLUSION

For the foregoing reasons, the Court should grant judgment as a matter of law in favor of Defendants or order a new trial. At a minimum, the Court should grant judgment as a matter of law on the claim that Royal Philips and Panasonic were members of the conspiracy and reduce the damages award accordingly. Alternatively, the Court should amend its findings with respect to the ownership/control exception and enter judgment in favor of Defendants.

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CERTIFICATE OF SERVICE

I certify that on July 2, 2015, I electronically filed the foregoing **DEFENDANTS' COMBINED MOTIONS FOR [1] JUDGMENT AS A MATTER OF LAW (FRCP 50); [2] IN THE ALTERNATIVE, FOR A NEW TRIAL (FRCP 59); AND [3] AMENDMENT OF FINDINGS IN BENCH TRIAL (FRCP 52(b)** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

Dated this 2nd day of July, 2015, at Los Angeles, California.

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